HONG LEONG FINANCE BERHAD

v.

REXTEX RUBBER PRODUCTS (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BHARU
DATO' ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-15-1990]
31 JULY 1996

CIVIL PROCEDURE: *Summary judgment - Order 14 Rules of the High Court 1980 - Whether triable issue existed - Whether question of law existed.*

BILLS OF SALE: *Lease of Latex Dipping Machine - Legality - Whether transaction one of "sale and lease back" transaction - Whether in reality a money lending transaction - Whether a device to overcome the provisions of the Bills of Sale Act 1950 - Whether void and unenforceable - Banking and Financial Institution Act 1989 s. 60(2).*

By a lease agreement dated 2 June 1988, the appellant leased to the first respondent a machine for 25 months, in consideration of the first defendant agreeing to pay a total sum of RM393,750 by 25 monthly instalments. On the same date, the second respondent, in consideration of the appellant entering into the lease agreement, executed a Guaranty and Indemnity document. The respondent failed to pay the instalments, whereupon the appellant commenced proceedings for the recovery of the arrears of instalments. After disposing off the machine, the outstanding amount due was RM337,616.12. However the first defendant was wound up by then, leaving the second defendant to contest the proceedings alone. The Senior Assistant Registrar refused to grant summary judgments against the proceedings. The appellant appealed.

Held:

[1] The purpose of O. 14 Rule of the High Court 1980 is to enable the plaintiff to obtain summary judgment without trial if he can prove his claim clearly and that the defendant is unable to set up a *bona fide* defence or raise a triable issue. In such an application, the Court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the issue is triable, though a complete defence need not be shown. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case.

[2] A triable issue may be established by showing that there is defence to the claim, a dispute on the facts, or that a point of law requires determination. The Court's role at the hearing of an application for summary judgment is not to delve into the merits of the issues raised by the defendant or whether the defendant is likely to succeed or fail.

[3] Here, a very important question of law surfaced. The entire transaction between the appellant and the first defendant was a 'sale and lease back', a money lending transaction disguised as a leasing agreement, the security for which was the machine.

[4] The lease agreement was in fact a devise to overcome the provisions of the Bills of Sale Act 1950, as at all material times the first defendant was already the owner of the machine. The Bills of Sale Act 1950 was to prevent needy persons from being compelled into signing disadvantageous and complicated documents. The Court has to examine the case and get to the real truth of the matter. As the transaction was not registered under the Bills of Sale Act 1950, it was void and unenforceable.

[5] As doubts persisted, this was not a fit case for summary judgment and the application would not be granted.

[6] The finance company cannot lend money or give any credit facility without security unless so ordered by the Central Bank of Malaysia by publication in the Gazette. In disbursing the sum without the delivery and installation of the machine, it was an attempt by the appellant to avoid the impact of s. 60(2) Banking and Financial Institutions Act 1989. This was another triable issue that would bar a summary judgment.

[Appeal dismissed. Decision of SAR affirmed]

Cases referred to:

Roberts v. Plant [1985] 1 QB 597 ***(refd)***
Jones v. Stone [1894] AC 122 ***(refd)***
Saw v. Hakim [1889] 5 TLR 72 ***(refd)***
The Electric and General Contract Corporation v. The Thomson - Houston Electric Company [1895] 10 TLR 103 ***(refd)***
Cow v. Casey [1949] 1 KB 474 ***(refd)***
Jacobs v. Booth's Distillery [1901] 85 LT 262 ***(refd)***
Thompson v. Marshall [1880] 41 LT 720 ***(refd)***
Ng Hee Thoong & Anor. v. Public Bank Bhd. [1995] 1 CLJ 609; [1995] 1 AMR 631 ***(refd)***
Manchester Sheffield and Lincolnshire Railway Company v. North Central Wagon Company [1888] 12 App. Cas. 554 ***(refd)***
Watson Ex Parte Official Receiver in Bankruptcy [1890] 25 QBD 27 ***(refd)***
United 40l Loan Club v. Bexton ***(refd)***
Madell v. Thomas & Co. [1891] QBD 230 ***(refd)***
Kiaw Aik Hang Co. Ltd. v. Tan Tien Choy [1964] 30 MLJ 339 ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn. Bhd. [1984] 2 MLJ 300 FC ***(refd)***
Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 MLJ 400 SC ***(refd)***
Yorkshire Railway Wagon Company v. Maclure [1882] Ch. D. 309 ***(dist)***
Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors. [1986] 1 MLJ 256 ***(dist)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 60(2)
Bills of Sale Act 1950, ss. 2
Rules of the High Court 1980, O. 14

For the appellant - A. Navamani; M/s. T.S. Chong & Co.
For the respondent - K. Sila Dass; M/s. K. Sila Dass & Partners

JUDGMENT

Abdul Malik Ishak J:

Miss A. Navamani, the learned Counsel for the appellant, orally applied for these two cases that came by way of an appeal from the decisions of the Senior Assistant Registrar ('SAR') to be consolidated and heard together. I acceded to her request as I was told that the Counsel for the respondent was amenable to this idea. These two cases were appeals from the decisions of the SAR who refused to grant summary judgments against the respondents for RM337,616.12 for civil suit no: 22-15-1990 and for RM380,497.66 for civil suit no: 22-16-1990. The arguments advanced by the parties for these two cases were based on similar grounds and I shall deal with each of these cases in sequence.

Civil Suit No: 22-15-1990

In a nutshell the facts were as follows. By a lease agreement dated 2 June 1988, the appellant as lessor leased to Rextex Rubber Products (M) Sdn. Bhd. ('Rextex') as lessee one new unit of an Automatic Latex Dipping Machine Model NCH C/W Accessories ('the said machine') for a period of 25 months commencing from 2 June 1988 and in consideration thereof 'Rextex' covenanted and agreed, *inter alia*, to pay the appellant the total sum of RM393,750 by way of rent by 25 monthly instalments of RM15,750 each with interest on overdue payment at the rate of 18% per annum simple interest calculated on a daily basis. On 2 June 1988, Ng Cheong Heng ('C.H. Ng'), in consideration of the appellant entering into the lease agreement, executed a Guaranty and Indemnity document. In due course, Rextex as lessee paid ten (10) monthly instalments of RM15,750 each and no more.

Two letters of demand, both dated 2 September 1989, were sent to Rextex and C.H. Ng wherein the appellant demanded payment of the arrears of instalments then outstanding. As there was no response to these letters of demand, the appellant commenced proceedings for the recovery of the arrears of instalments. On 15 June 1990, the appellant took re-possession of the said machine. Acting cautiously and pursuant to the lease agreement, the appellant on 8 November 1991 disposed off the said machine for RM23,333.33 to the highest tenderer. After taking into account the proceeds of sale, the outstanding amount due as at 26 November 1991 was RM337,616.12. By a stroke of misfortune Rextex was wound up on a petition by one of its creditors, leaving

C.H. Ng to contest the proceedings alone. On 12 February 1993 the appellant through their solicitors sent a letter of demand to C.H. Ng for the sum of RM337,616.12.

It is now well known that the purpose and object of an O. 14 of the Rules of the High Court, 1980 (RHC) is to enable the plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue which ought to be tried: *Roberts v. Plant* [1985] 1 QB 597. The Privy Council in *Jones v. Stone* [1894] AC 122 considered summary judgment:

> ... to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay.

A triable issue may be established by showing that there is a defence to the claim, a dispute on the facts (*Saw v. Hakim* [1889] 5 TLR 72), or that a point of law requires determination (*The Electric and General Contract Corporation v. The Thomson - Houston Electric Company* [1895] 10 TLR 103; *Cow v. Casey* [1949] 1 KB 474). The House of Lords in *Jacobs. v. Booth's Distillery* [1901] 85 LT 262 established that the Court's role at the hearing of an application for summary judgment is not to delve into the merits of the issues raised by the defendant. The Court is supposed to determine whether an issue has been raised, it is not for the Court to consider whether the defendant is likely to succeed or fail. Bramwell LJ in *Thompson v. Marshall* [1880] 41 LT 720 tersely said that O. 14 was:

> ... intended to apply to clearly undefended causes, and to prevent defendants from putting in statements of defence for the purpose of delay where there could be no defence on the merits. Here the Judge had a doubt as to whether there might be a defence or not, and therefore this is not a case for judgment in a summary manner.

Back home in the country, Gopal Sri Ram JCA in *Ng Hee Thoong Anor. v. Public Bank Bhd.* [1995] 1 CLJ 609; [1995] 1 AMR 631 succinctly observed:

> The effect of O. 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no *bona fide* triable issues.

With these brief facts and principles of law in mind I shall now proceed to consider the arguments of both parties.

Now, looking at the Statement of Claim the appellant hinged their case on the lease agreement in respect of the said machine. The appellant said that the seller of the said machine was Messrs. Lee Fong Engineering Works. From the lease agreement it is plain that the appellant had originally bought the said machine and subsequently, had it leased to Rextex. Put differently, the appellant was saying that as at 2 June 1988 they were the owner of the said

machine and they had the title and property of the said machine. The guaranty indemnity document was not only signed by C.H. Ng but there were two others who were signatories to it. They were Chng Gim Huat and his son Chng Beng Siong. Since it was a joint guaranty and indemnity, the appellant was entitled to elect to proceed against C.H. Ng only. That would be the appellant's prerogative. But all the same the appellant must explain, as was pointed out by Mr. K. Sila Dass, the kind of compromise that was reached with the other co-guarantors for the consumption of the Court. The reason for omitting the other co-guarantors as parties to the civil suit could as rightly pointed out by Mr. K. Sila Dass be known at the trial proper. Isn't this then a triable issue that merits a full trial?

C.H. Ng raised the following triable issues:

(1) that the entire transaction between the appellant and Rextex was a money lending transaction disguised as a leasing agreement;

(2) that the lease agreement was in fact a devise to overcome the provisions of the Bills of Sale Act, 1950 because at all material times Rextex was already the owner of the said machine or the said machine had been manufactured solely for Rextex's business venture; and

(3) that prior to 2 June 1988 Rextex had unsuccessfully applied for a loan facility with the appellant but the moment Chng Gim Huat (one of the guarantors and who was not made a party to this suit) became a director of Rextex, the loan facility was accorded to Rextex. It was said that Chng Gim Huat was a director of the appellant's Singapore associated company and wielded considerable, if not powerful, influence over the appellant.

Mr. K. Sila Dass pointed out that C.H. Ng held the view that the leasing transaction as claimed by the appellant was not a genuine leasing transaction but rather a "sale and lease back" which had the flavour of a money lending transaction.

By letter dated 15 March 1988 (Exh. NCH 1 as per the affidavit of C.H. Ng in encl. 44) there was clear evidence to show that Rextex had placed an order with Lee Fong Engineering works for the manufacturing of the said machine.

There was evidence that Rextex had paid by way of six instalments amounting to RM320,000. C.H. Ng had exhibited three bank statements which showed that a total sun of RM200,000 had been cleared. Three other cheques totalling RM120,000 had been disbursed but it was untraceable and this could easily be overcome by way of discovery before the trial proper. These payments showed that Rextex had arranged for the purchase of the said machine and paid substantial amount by 2 June 1988 when the lease agreement was entered between the appellant and Rextex. Thus, the appellant cannot say, so submitted Mr. K. Sila Dass, that they had bought the said machine from Messrs. Lee Fong Engineering Works for the benefit of Rextex. As stated earlier Rextex's

earlier application for a loan was rejected by the appellant and it was only after Chng Gim Huat and Chng Beng Siong became directors of Rextex that the appellant approved the loan for the purchase of the said machine. Thus, through documentary exhibits (this was as a result of negotiations between Chng Gim Huat solely or together with Chng Beng Siong for the loan with the appellant) it will be noted that the price of the said machine was revised to RM359,000 by Messrs. Lee Fong Engineering Works.

The appellant, on the other hand, through the affidavit of Ng King Hou that was affirmed on 10 June 1995 particularly at para. 5 admitted that they agreed to purchase the said machine from Rextex for RM350,000 and they then agreed to lease then back to Rextex. Indeed if this averment was true, then this Court has to proceed further to seek the truth and to find out whether.

(a) the said machine had been manufactured at the time of the alleged purchase by the appellant and that it was in the physical possession of Rextex;

(b) Rextex had the title and property to pass to the appellant when Rextex purportedly sold the said machine to the appellant;

(c) the purchase price of the said machine at RM350,000 was paid by the appellant to Rextex on 2 June 1988 upon compliance with points (a) and (b) above.

Surely these probing questions would bar an O. 14 application. I have doubts whether C.M. Ng had a defence or not to the suit filed against him (*Thompsom v. Marshall (supra)* and, it is my judgment, that this is not a simple case as the appellant tried to project and it is not a fit case for summary judgment.

A very important question of law surfaced and this can conveniently be stated thus: What was the actual nature of the transaction between the appellant and Rextex? Was it a leasing arrangement as submitted by Miss A. Navamani or a money lending transaction for which the said machine was taken as security to ensure repayment of the loan as submitted by Mr. K. Sila Dass. However, by the very admission of the appellant that it had bought the said machine from Rextex and taking into perspective the facts and circumstances of the whole case, I am impelled to say that it was not a leasing transaction but rather a money lending exercise, the security for which was none other than the said machine. This brings me to the Bills of Sale Act, 1956. It is not out of place to say that the Bills of Sale Act, 1950 was enacted to prevent needy persons from being cornered into signing complicated documents which they might often be unable to understand and later had to suffer in silence for their folly see *Manchester Sheffield and Lincolnshire Railway Company v. North Central Wagon Company* [1888] 12 App. Cas. 554 where at p. 560, Lord Herschell said: It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of harsh and

unreasonable provisions. I do not propose to go into the scheme of the Bills of the Sale Act, 1950 in extenso but suffice for this exercise that reference may be made to s. 2 thereof which provides that the Act shall apply to every bill of sale, whether the same is absolute or subject or not subject to any trust, whereby the holder or grantee has power, either with or without notice and immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale, but shall not, except as in this Act expressly mentioned, apply to mortgages, charges or debentures issued by any incorporated company and secured upon the stock or goods, chattels and effects of such company.

Now, reverting back to the evidence we have an admission by the appellant that they bought the said machine from Rextex and leased it back. The appellant did not purchase the said machine from Messrs. Lee Fong Engineering Works for the benefit of Rextex. The appellant bought the said machine from Rextex for the purpose of advancing a loan and this clearly activates the provisions of the Bills of Sale Act, 1950. It must be noted that this fact was not disclosed in the statement of claim nor in the affidavit of the appellant in support of their O. 14 application. In my judgment, it is this type of transaction that the Courts should be wary of as such transactions fall squarely within the ambit of the Bills of Sale Act, 1950. Lord Esher MR. In *re Watson Ex Parte Official Receiver in Bankruptcy* [1890] 25 QBD 27 at p. 32 and 33 remarked:

> In my opinion, the Court ought never to let a sham document, drawn up for the purpose of evading an Act of Parliament, prevent it from getting at the real truth of the matter.

Further down the same page in the same case, Lord Esher MR cited a passage of Fry LJ in the case of *United 40L Loan Club v. Bexton* (unreported) to the following effect:

> When there is a document, the Court has to consider the true nature of the document; and if, on consideration of its true nature, they arrive at the conclusion that it is one of the documents enumerated in the definition clause of the Bills of Sale Act, then it requires registration.

At p. 37 of the same case, Lord Esher MR continued:

> I do not deny that people may evade an Act of Parliament if they can, but, if they attempt to do so by putting forward documents which affect to be one thing when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the Court will go through the documents in order to arrive at the truth. So when the transaction is in truth merely a loan transaction, and the lender is to be repaid his loan and to have a security upon the goods, it will be unavailing to cloak the reality of the transaction by a sham purchase and hiring. It will be a question of fact in each case whether there is a real purchase and sale complete before the hiring agreement. If there be such a purchase and sale in fact and afterwards the goods

> are hired, the case is not within the Bills of Sale Act. The document itself must be looked at as part of the evidence; but it is only part, and the Court must look at the other facts, and ascertain the actual truth of the case. Here it is found as a fact that there was no real transaction of sale: that there was nothing but a loan accompanied by a security given upon the goods, the terms of which are contained in the document in question. That being so, the form of the document does not prevent our looking at the real truth of the case, which is that the document is not really a hiring agreement, but in substance contains the terms of a loan and the security given for it upon personal chattels. The document so regarded is at least a licence to take possession of personal chattels within the Act, and therefore a bill of sale.

In *Madell v. Thomas & Co.* [1891] QBD 230 especially at p. 233, Lord Esher MR in clear terms said:

> The object of the legislature in those Act has been to protect borrowers against lenders as well as to protect other persons who might be creditors of borrowers. The main object of the Act of 1882 is to protect borrowers as against lenders. When we look at the Act we find that it deals with documents that certainly are not, in the ordinary meaning which they bear, and which but for the Act could not be disputed by the parties, bills of sale; and the necessary implication arises that documents, which are in the ordinary meaning of language on the face of them not bills of sale, shall, nevertheless, be bills of sale within the meaning of the Act, if certain facts exist which do not appear on the face of the document. It follows that the Court must have greater power with regard to the effect to be given to such documents under the Act than they would have apart from the Act. Suppose there was an agreement in writing not under seal by which certain rights were given over personal property, but which on its face would not be a bill of sale within the terms of the Act apart from any question under the Act. Apart from the Act, no evidence could be given of any other intention than that which appeared from the agreement itself. But it is in my opinion obvious that it was intended by the Act, that, though such might be the form of the agreement, the Court go into the question whether the agreement was not in reality given by way of security for money lent.

Lopes LJ writing a separate judgment in the same case agreed with Lord Esher MR and at p. 236 his Lordship said:

> The Bills of Sale Act 1882, was passed, beyond all doubt, to protect borrowers, and, if the real nature of the transaction could not be investigated, but only the form of the document could be regarded, the consequence would be that the Act would be evaded every day. The money-lender would always make the borrower execute an instrument that purported to be an absolute assignment, although the real transaction was only a loan of money on security. That consideration seems to me to be a strong ground for the conclusion that we are bound in such a case to consider the real nature of the transaction, and not to look at the form of the document only.

Reverting back to the mainstream of the case, as stated earlier the said machine belonged to Rextex who had it manufactured by Messrs. Lee Fong

Engineering Works and in this context it is germane to have sight of the letter dated 27 April 1988 that was addressed to Rextex from the appellant as reflected at Encl. 44 of Exh. "NCH 2". That letter reads as follows:

> We are pleased to inform you that subject to the provisions hereunder Hong Leong Finance Berhad has agreed to buy the following goods for the purpose of leasing the same to you.

These words reflect one thing: that the appellant "has agreed to buy" the said machine from a certain source and they then would lease it to Rextex. This was a lie. It was not true. This divergent view creates a triable issue that does not merit an O. 14 application.

Further down the same letter under column "Special Condition", it was stated that:

> The payment of RM350,000 will be made directly to Rextex Rubber Products (M) Sdn. Bhd. upon delivery of the equipment and upon confirmation of full payment having been made to the original suppliers.

It is quite obvious that if the appellant purchased the said machine from Messr. Lee Fong Engineering Works for the purpose of leasing it to Rextex, then the payment should be made direct to Messrs. Lee Fong Engineering Works and not to Rextex as was the case here. Since the payment was made direct to Rextex an irresistible inference is arrived at in that the whole transaction was nothing more than a money lending transaction for three simple reasons:

(a) the payment was made to Rextex;

(b) the said machine had not been delivered to Rextex although the letter had confirmed on 23 May 1988 that they were in receipt of the said machine and had installed them (see Encl. 44 Exh. "NCH 4"). In fact the actual delivery of the said machine was on 24 September 1988 (see Exh. "NCH 5" of Encl. 44)

(c) there was no full payment of the purchase price of the said machine by Rextex to Messr Lee Fong Engineering Works.

Assuming for a moment that emphasis should be laid to the letter dated 27 April 1988 that was addressed to Rextex from the appellant as seen in Exh. "NCH 2" of Encl. 44 and which was reproduced earlier, two conditions must still be fulfilled, namely:

(1) Messrs. Lee Fong Engineering Works should have delivered the said machine to the appellant,

(2) Rextex confirming that full payment for the said machine had been made to Messrs. Lee Fong Engineering Works.

Events have proved that both these conditions were not fulfilled and despite this setback the appellant, in breach of its own condition, proceeded to release

the sum of RM350,000 to Rextex. This shows that the true nature of the whole transaction was nothing more than a money lending transaction where the said machine was meant as security for the repayment of the loan as advanced by the appellant to Rextex.

Consequently, the whole transaction comes within the ambit and purview of the Bills of Sale Act, 1950 which makes it void and unenforceable in a Court of law. That was the submission of Mr. K. Sila Dass to drive home the point that the O. 14 application ought to be nipped in the bud and the matter be allowed to proceed for trial so that C.H. Ng will have his day in the witness box.

Another interesting facet appears to the whole case when Ng King Hou in an affidavit affirmed on 2 May 1996 produced a contract for sale dated 2 June 1988 purportedly entered between Rextex and the appellant. However, no explanation was forthcoming as to why this document was not produced earlier. A perusal of this document shows that the common seal of Rextex was no where to be seen. One must not lose sight of the fact that the resolution dated 23 May 1988 empowers the fixation of the common seal in the presence of the directors and, sad to say, this was not done. In my judgment the document cannot be relied as it was incomplete. If I am wrong, I will now proceed, in an attempt not to leave any stone unturned, to scrutinise the document in some detail. I note the following observations in regard to that document:

(1) it was dated 2 June 1988;

(2) it carried the price tag of RM350,000;

(3) it stated that "the purchase price shall not be paid until after inspection of the goods in the premises of the vendor;

(4) it stated that "the purchase price shall not be paid until after production of invoices and/or other papers evidencing the vendor's title in the goods";

(5) it also stated that "the property in the goods shall not pass until payment has been made as aforesaid."

Now, relying on this document the appellant should not have released payment of RM350,000 until all the conditions have been complied with or satisfied. There was ample evidence to show that the said machine was not delivered and installed on Rextex's premises until 24 September 1988 but nevertheless RM350,000 as the price of the said machine was released either on 2 June 1988 or 3 June 1988 or on a date earlier than these two dates as reflected in Exh. "NCH 6" of Encl. 44.

Event if I were to accept the contract for sale as alluded to earlier as valid, it must be stressed that Rextex could have passed any property or title to the said machine as it was not delivered to Rextex on the due date. The appellant

has not explained by affidavit evidence that they chose to release RM350,000 on or about 2 June 1988 without ensuring that the said machine has been delivered and installed. The condition in the contract for sale to the effect that the purchase price shall not be paid until after inspection of the said machine at the premises of Rextex as the vendor was very clear and unequivocal. Arising out of this, and it was the submission of Mr. K. Sila Dass that the scenario of whole case was not one of a leasing transaction but rather a money lending transaction or for that matter disguised as one.

In *Kiaw Aik Hang Co. Ltd. v. Tan Tien Choy* [1964] 30 MLJ 339 where by an agreement in writing dated 2 June 1959 the plaintiffs, a finance company, let a taxi to the defendant, a taxi driver, on hire purchase at the hire purchase price of $10,153.50. The defendant paid the initial payment on the same day and subsequently he paid eight monthly instalments. On 9 March 1960 the defendant agreed to pay to the plaintiffs the total amount then due under the agreement and thereby acquire ownership of the car. He was then to sell the car back to the plaintiffs for $8,000. What happened in fact was that the plaintiffs deducted the amount of the remaining instalments less a rebate from the purchase price of $8,000 and paid the balance to the defendant in cash. On the same day the plaintiffs entered into a second hire-purchase agreement with the defendant under which the agreed hire purchase price was $9,568. The defendant again made an initial payment and agreed to pay the balance by monthly instalments. There was a further transaction relating to the car between the parties on 17 June 1960, and the facts of this transaction were in dispute. The learned trial Judge found that this third transaction did not affect the question of the ownership of the car. This prompted the plaintiffs to seek a declaration that they were the owners of the motorcar. Choor Singh J at p. 343 was of the view that:

> In a genuine hire purchase transaction there is no question of the owner of a chattel advancing money to its hirer. When money passes from the owner of the chattel to the hirer, no matter under what guise, the transaction is clearly a money-lending transaction.

and his Lordship then proceeded to give judgment in favour of the finance company. On appeal to the old Federal Court (Barakbah CJ (Malaya), Wylie CJ (Borneo) and Winslow J), the decision of Choor Singh J was reversed. Wylie CJ (Borneo) delivering the judgment of the old Federal Court aptly said at p. 103 that

> The real transaction that took place on that day was obviously an advance of money by the respondent to the appellant and repayment was secured by adding that amount to the balance owing under the original agreement and obtaining the appellant's signature to this agreement covering the total sum. This was therefore an agreement entered into for the purpose, *inter alia*, of securing repayment of the money advanced by the lessor of the chattel to the hirer, and is therefore within the extended meaning of a bill of sale set out in s. 2 of the ordinance.

It is my judgment, on a proper analysis of the whole case, that the transaction between the appellant and Rextex was nothing more than a money lending transaction. The said machine was not available in the market on 2 Jun 1988 yet it was taken as a security by way of a leasing agreement. To all intents and purposes that leasing agreement was a bill of sale, consequently, it is caught under the purview of the Bills of Sale Act, 1950. As a bill of sale that lease agreement was not registered under the Bills of Sale Act 1950 and that being the case the appellant's claim was void under the law.

Mr. K. Sila Dass took me on a voyage of discovery more inclined towards the requirements as stipulated in the case of *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300 FC, where Seah FJ (as he then was) speaking for the old Federal Court said:

> For the purposes of an application under O. 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of r. 2 of the O. 14

On the next page, Seah FJ (as he then was) continued in serious vein:

> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see O. 14 r. 3 and 4(1)).

It was no wonder that Mr. K. Sila Dass took extra submission as it was put upon C.H. Ng to show that the "judgment should not be given against him". I must say it was not an exercise in futility. It was a fruitful venture.

In *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 MLJ 400 SC, the headnote reads:

> In an application under O. 14, the Court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the Court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.

In my judgment, Mr. K. Sila Dass has succeeded in establishing triable issues on some points as adumbrated above and, consequently, the appellant's appeal must fail.

Lest I be accused of an oversight, I must now address my attention to the submission of Miss A. Navamani. She submitted that it was a genuine leasing transaction between the appellant and C.H. Ng and her appeal should be allowed. She relied on two authorities to support her submission. The first is *Yorkshire Railway Wagon Company v. Maclure* [1882] Ch. D 309 and the second is *Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors.* [1986] 1 MLJ 256.

The facts in *Yorkshire's* case *(supra)* may be stated thus.

A railway company being in want of money, and being advised that they had no power to borrow, sold part of their rolling-stock to a Wagon Company for 30,000 pound, at the same time making a contract with the Wagon Company for the hire of the same rolling-stock at a rent which would repay the 30,000 pound with interest in five years, and then for its re-purchase at a nominal price. At the same time three of the directors guaranteed to the Wagon Company the payment of the rent.

The Wagon Company brought an action against the Railway Company and the sureties for non-payment of rent due.

Kaye J held that the transaction was void as against the Railway Company but enforceable against the sureties. On appeal the Court of Appeal held that the transaction was not a borrowing of money, but a *bona fide* sale and hiring of the rolling-stock, and was valid both against the Railway Company and the sureties.

Jessel MR, after narrating the circumstances surrounding the transaction, observed at p. 313:

> No one who knows about such matters and reads the correspondence can doubt for a moment that the solicitors on both sides believed that that was a real transaction now, whatever it was before. In other words, as far as the Railway Company is concerned it is clear to demonstration that they did not intend to do anything which was illegal; they were advised that the original notion was illegal, and they determined to carry out their object in a legal way.

It is pertinent to point that *Yorkshire's* case can be distinguished and clearly distinguishable in the sense that both the Railway Company and the Wagon Company had no power to borrow or lend money respectively. In the present appeals, the appellant being a licensed Finance Company whose primary duty is to lend money and empowered to do so would be on a different footing than the Wagon Company in the *Yorkshire's* case. Unlike the Railway Company in the *Yorkshire's* case, Rextex had the power to borrow money. Furthermore, the Railway Company in the *Yorkshire's* case had in fact sold ten of their locomotive engines and two hundred of their wagons to the Wagon Company for 30,000 pound and they were actually delivered to the Wagon Company. The Wagon Company too wanted owner plates fixed and this was

complied by the Railway Company. Whereas by comparison, in the present appeal, there was no real sale because the said machine was not ready on 2 June 1988 when the purported contract for sale was executed. Again in the *Yorkshire's* case, the English Court of Appeal looked at the two transactions that had taken place, one was illegal and the other which was entered into on the advice of the eminent Counsel formed the actual intention of the parties.

I shall now refer to an English case where the Bills of Sale Act, 1878 was put under scrutiny. This is the case of *In re Watson, Ex parte Official Receiver In Bankruptcy (supra)* and the facts can briefly be stated thus. A transaction purported to be a sale of personal chattels, followed by a hiring and purchase agreement, whereby the vendor agreed to hire the chattels from the purchaser and to pay quarterly sums for such hire, until a certain amount was paid, when the chattels were to become again the property of the vendor, and power was given to the purchaser to take possession of the chattels on default in payment. No sale or hiring of the chattels, however, was really intended, the object, in truth, being merely to create a security for a loan of money to the supposed vendor from the supposed purchaser. It was held that the true nature, not the form of the transaction, must be regarded, and that the supposed hiring and purchase agreement was a bill of sale within the Bills of Sale Acts. Lord Esher MR approached the case in this way:

> Now, what are the facts as found by the county Court Judge? He finds in effect that the bankrupt did not desire to sell the furniture, but she wanted to borrow money on the security of the furniture in order to prevent its being sold in execution. He finds that Love did as a matter of fact lend her money, and was to have some right by way of security over the furniture: so that she never really intended to sell the furniture, and he never intended to buy it. If he intended to buy and pay a price for it, it is impossible to say that he intended to lend money upon the security of it. The two things are inconsistent. If he intended to buy it for the money he gave, the moment he had paid the money he had nothing more to do with the bankrupt: the furniture was his. To say that he really bought this furniture for 150 pound in this case seems to me impossible; he really intended to lend 150 pound on condition of being paid 200 pound in certain instalments by way of principal and interest. The fact being, as the County Court Judge says, that the parties never intended to buy or sell respectively. Love goes to the bankrupt's house with another person; a chair is then put into the bankrupt's hand with instructions to hand it to Love, which she accordingly does, and Love then leaves the house. The county Court Judge has found, in substance, that this proceeding was a mere form. It was intended, that is to say, that there should be the form of a constructive delivery, as in the case of a purchase and sale; but it is found that there never was a purchase and sale, and therefore the supposed delivery was a mere sham. What really happened was that there was a loan of 150 pound, which was to be repaid with enormous interest, by the payment of 200 pound by quarterly instalments. Then what was to be the security? The security was, in truth, to be a power to seize the furniture and sell it, if the bankrupt made default in the stipulated payments. Such was

> the agreement which the parties came to in point of fact. Then what was the evidence of the lender's right to this security? He would really have had no security, unless it were put into a writing. The agreement of 7 February is really the evidence of his security. Without it there would be no evidence of her liability to pay or his right to seize the furniture if she did not pay. What kind of security then is this document? It is at least a licence to take possession of personal chattels. If this is the case of a loan of money secured by a licence to seize the furniture in default of payment, and this document is the evidence of such security, then it is obvious that the document comes within the 4th section of the Bills of Sale Act, 1878. If, however, the transaction amounted to a mortgage of the furniture, then it seems to me that this document would be the evidence substantiating such mortgage, and therefore an assurance of personal chattels, and so either way the document would be within the Bills of Sale Act. The judgment of the county Court Judge does not appear to deny that this would be so, unless the form of the transaction prevented the Court from giving effect to the truth of the matter. Therefore, the question is, whether it has been decided that we cannot, as my brother Lindley tersely put it in one of the cases, go through the document to get at the truth. In my opinion the Court ought never to let a sham document, drawn up for the purpose of evading an Act of Parliament, prevent it from getting at the real truth of the matter. Has any case decided the contrary? I do not think so.

My reading and understanding of *Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors. (supra)* shows that the bank facilitated the purchase of the equiptment and there was no indication at all that the defendant in that case had bought the equiptment earlier like the present appeal before me. Furthermore in the *Bank Islam's* case *(supra)* the defendant there had applied for letter of credit and leasing facility which the bank, in due course, approved. There was nothing in that case to indicate or even suggest that it was a loan transaction. There was also evidence before the Court that *Bank Islam* does not and have not granted loans to anybody or corporate body except on qard al hassan basis.

Now, in the present appeal it is undeniable the appellant as a licensed finance company was empowered to lend money. What is of paramount importance is to note that the appellant cannot lend money or give any credit facility without security unless so ordered by the Central Bank of Malaysia by publication in the Gazette: s. 60(2) of the Banking and Financial Institutions Act, 1989. What is obvious is this. In disbursing RM350,000 hastily on 2 June 1988 on the same date when the lease agreement was executed without the delivery and installation of the said machine, one cannot help but observe that the appellant was trying to avoid the impact of s. 60(2) of the Banking and Financial Institutions Act 1989. Surely this point is also a triable issue that would bar an O. 14 application.

For the reasons adumbrated above, I dismissed the appeal with costs and affirmed the decision of the SAR. An early trial should be fixed for this case.

Civil Suit No: 22-16-1990

The facts in this case are similar with that of Civil Suit No: 22-15-1990 except that the lease agreement was dated 12 August 1987 and the machine comprised of one Latex Dipping Machine with Examination Formers 1,600 pieces attached with accessories. The outstanding amount due as at 26 November 1991 was RM380,497.66. There was no contract for sale dated 2 June 1988 like Civil Suit No: 22-15-1990. I ruled that the appeal in Civil Suit No: 22-16-1990 should be dismissed with costs and the decision of the SAR affirmed. An early trial was also ordered.

Reported by Tey Tsun Hang